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No. 994

In The

# Supreme Court of the United States

October Term, 1967

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SHIRELEY JEAN ESTES; LISHA DAWN ESTES; SHAWNA ANNETTE ESTES and DAVID LAIRD ESTES,

*Petitioners.*

v.

CAMDEN FIRE INSURANCE ASSOCIATION OF GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION LIMITED; STATE AUTOMOBILE MUTUAL INSURANCE COMPANY; FRANK M. GUSWEILER; STATE OF OHIO and UNITED STATES OF AMERICA,

*Respondents.*

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## BRIEF OF RESPONDENT, STATE AUTOMOBILE MUTUAL INSURANCE COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## JURISDICTION

The Petition filed herein invokes this Court's jurisdiction under 28 U.S.C.A. 1257 (3). Inasmuch as that statute confers jurisdiction only as to the review of rulings and judgments of the highest court of a State, the caption of the Petition does, in itself, demonstrate the inapplicability of that statute.

This Respondent's opposition to jurisdiction does not, however, rest solely upon Petitioners' citation of an inapplicable statute. Respondent contends that a review of the Petition and of the record will demonstrate that the jurisdiction of this Court is not and cannot be properly invoked under any federal statute for the reason that no federal question either is now or has ever been properly presented.

It has long been recognized that the jurisdiction of the courts below over the subject matter of the action must affirmatively appear of record in order for certiorari to be available. *Good Shot* v. *U. S.*, 1900, 179 U.S. 87; *Mansfield, etc. R. Co.* v. *Swan, Ohio* 1884, 111 U.S. 379; *King Iron Bridge, etc. Co.* v. *Otoe County, Neb.* 1887, 120 U.S. 225; *Cameron* v. *Hodges, Tenn.* 1888, 127 U.S. 322; *Parker* v. *Ormsby, Neb.* 1891, 141 U.S. 81.

The ruling sought to be reviewed is the affirmance by the U. S. Court of Appeals for the Sixth Circuit of the District Court's dismissal of plaintiff's complaint. A review of that complaint will clearly indicate that it is devoid of any factual statement which could form the basis for federal jurisdiction. It attempts, instead, by broad sweeping generalizations, to create federal jurisdiction by rhetoric rather than by factual allegation.

This Court in *Underground Railroad Company* v. *City of New York*, 193 U.S. 416 stated at page 422:

> "If, on the face of complainants' statement of their own case, it does not appear that the suit really and substantially involved a dispute or controversy as to the effect or construction of the Constitution, on the determination of which the result depended, the Circuit Court was right (in dismissing for want of jurisdiction) and its decree must be affirmed."

With even more direct application to the allegations of the present complaint the court stated at page 430:

> "The result is that it appeared on the record that complainants possessed no contractual rights, which were impaired, or of which they were deprived and that the suit did not really and substantially involve a dispute or controversy as to the application of the Constitution."

Again in *Defiance Water Company* v. *Defiance*, 191 U.S. 184 this Court stated in its syllabus:

> "When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon determination of which the result depends, it is not a suit arising under the Constitution or laws, and it must appear on the record, by a statement in legal and logical form, such as is required in good pleadings, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States before jurisdiction can be maintained on the ground."

## CERTIORARI SHOULD BE DENIED

Inasmuch as the Petition seeks review of the ruling of the United States Court of Appeals for the Sixth Circuit wherein the District Court's dismissal of plaintiffs' complaint was affirmed we must, of necessity, look to that complaint to determine whether in its dismissal there arise such special and important considerations as to warrant the granting of certiorari. A reading of that complaint and of the District Court's characterization of it in its Memorandum Opinion and Order will quite adequately demonstrate to the Court the true nature of the controversy here presented.

The complaint itself, without question, manifests a patent failure to state a cause of action as to this respondent

or, in fact, as to any of the respondents. Nowhere in that voluminous complaint is there so much as one statement of anything which the respondents did or failed to do that would form a predicate of liability. Although repeated conclusionary references are made to supposed violations of the Petitioners' civil rights, in no instance are those references clarified or supported by factual allegation. The necessity for such a statement cannot be ignored.

> "A complaint, from which it could not be discovered what claim was intended to be made, was insufficient." (*Nicol* v. *National Savings and Trust Company*, 250 F.2d 36, cert. den. 357 U.S. 909, rehearing den. 358 U.S. 859).

From the obvious malevolence of the charges so wantonly leveled at the various Respondents one must conclude, as did the District Court, that the complaint represents "the personal vendetta of counsel . . . rather than a sincere and bona fide attempt to recover monetary damages for the plaintiffs." Although the complainants pray for a total recovery of $133,200,000.00, it is devoid of any allegation that would constitute a basis for such a prayer or indeed for damages of any kind.

Thus, the District Court, called upon to determine whether such a complaint stated a claim upon which relief could be granted, had no alternative but to find that it did not.

Although Petitioners' failure to state any claim as to this Respondent would render further analysis of the complaint academic, we feel compelled to observe that, at least as to this Respondent, it would have been impossible for them to state a claim under 42 U.S.C.A. 1983. That statute provides for redress only as to those defendants who act "under color of statute . . . of any state or territory." This Respondent, being a private corporation rather than

a governmental agency or officer, is unquestionably not among that class of persons contemplated by the statute.

"Under color of law" was defined by this Court in *Williams* v. *State,* 341 U.S. 97:

> "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law" (citing *United States* v. *Classic,* 313 U.S. 299).

The U. S. Court of Appeals for the Ninth Circuit in the case of *Schatte et al* v. *International Alliance etc. et al,* 182 F.2d 158 stated:

> "Under statute providing that every person, who, 'under color of any statute, ordinance, regulation, custom, or usage, of any state or territory,' subjects any person to deprivation of rights, privileges or immunities secured by Constitution and laws, shall be liable to party injured, reason for quoted phrase is to bring wrongful acts within the scope of state action under Fourteenth Amendment, and therefore, to be liable under the statute, employers and union who were alleged to have made certain misrepresentations would have had to act, or purport to act, on behalf of the state as state officials, or, possibly, to conspire with persons so acting.
>
> "Making representations to a state official, even in a report required by law, is not acting 'under color of law' within statute creating right of action for deprivation of rights."

The Ninth Circuit Court of Appeals denied rehearing en banc of the *Schatte* case at 183 F.2d 685. Certiorari was denied by this Court (340 U.S. 827) as was rehearing (340 U.S. 885).

Obviously the only opinions written in this Court in civil rights matters involve those cases in which certiorari

was granted and those cases do not, therefore, relate to matters analagous to that now under consideration. The circuit courts, however, have had frequent occasion to review litigation in which questions of civil rights violations were inappropriately raised.

The case of *Williams* v. *Yellow Cab Company of Pittsburgh,* 200 F.2d 302 dealing with a non-governmental defendant, gave the Third Circuit Court of Appeals the opportunity to observe:

> "The Fourteenth Amendment to the Federal Constitution and Federal Civil Rights Act, enacted to enforce such Amendment, are directed only to state action. An invasion of individuals' rights by other individuals is not within their purview."

The Court of Appeals for the Eighth Circuit, again dealing with a non-governmental corporate defendant, came to a similar conclusion in the case of *Moffett* v. *Commerce Trust Co.,* 187 F.2d 242, stating:

> "The Civil Rights Act granting protection to persons from conspiracies to deprive them of rights secured by the Constitution and laws of the United States, do not have the effect of taking into federal control the protection of private rights against invasion by individuals."

The case of *Hardyman* v. *Collins* was eventually considered by this Court and is reported at 341 U.S. 651. In that case the District Court dismissed a complaint which, unlike the present case, alleged clearly defined actions on the part of the defendant, and in doing so stated:

> "Unless act denounced as a violation of plaintiffs civil rights is in aid of state action which results in deprivation of equality, the wrong is a private wrong, such as assault, battery, trespass or the like, and not within the Civil Rights Statute.

> "Before liability under the Civil Rights Statute attaches, there must be a violation of national rights, and such violation must be by the state, one of its agencies, or persons being or claiming to be repositories of the state power."

The Court of Appeals for the Ninth Circuit reversed this dismissal by the District Court with one of three judges dissenting. (183 F.2d 308). This Court, however, reversed the Ninth Circuit Court of Appeals and affirmed the District Court's dismissal of the complaint. In the majority opinion, delivered by Justice Jackson, the case of *Shelley* v. *Kraemer*, 334 U.S. 1 is cited with the following quotation from page 13 of that opinion:

> "Since the decision of this court in the civil rights cases, 109 U.S. 3 (1883), the principle has become firmly imbedded in our constitutional law, that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the states. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."

Justice Jackson made reference to the dissent of Judge Healy of the Ninth Circuit and, together with the majority of this Court, approved the view taken by Judge Healy and the District Court. Judge Healy's opinion contains the following language, which we believe to be uniquely applicable to the case now before the Court:

> "I need not review the allegations of the pleading thought insufficient below to confer federal jurisdiction. That task has already been performed by the trial judge. In his analysis of the factual aspects of the complaint, he has revealed this case to be the transparent sham it is when read against the actual wording of the statute. Here, as his discussion shows, a sporadic incident of transient interference with the

> exercise of a right is, by the ingenuity of counsel, dressed up in grave, constitutional attire, and pointed to as a 'deprivation' of the right."

The above language is, as we have noted, indeed uniquely applicable in the present situation. Judge Peck of the United States District Court for the Southern District of Ohio did, as did the District Court in the *Hardyman* case, reveal the case to be the transparent sham that it is.

The case of *Monroe* v. *Pape,* 365 U.S. 167 and the Circuit Court and District Court cases cited by Petitioners' are no more related to the question at hand than is Petitioners' argument.

While suppressing the temptation toward invective that is invited by Petitioners' reckless defamations, it must be said — for it is far too obvious to ignore — that Petitioners' entire case, here and in the courts below, is more than ineffectual. It is more than illogical. It is, in glaringly obvious fact, irrational beyond the point of intelligent or meaningful analysis.

This matter has unconscionably consumed the time and energies of all those whom it has touched. One judge of the District Court and three judges of the Circuit Court have taken time that should have been devoted to serious, critical questions in a sincere attempt to glean some reason from an irrational document. The time and energy of the nation's highest Court cannot be wasted in the same effort.

## CONCLUSION

The question presented by the Petition is not one of great public or national interest. It is, in fact, a question that affords an obvious answer. That answer was given by the District Court and affirmed by the Circuit Court of Appeals.

Certiorari should, therefore, be denied.

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